

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-575

COMMONWEALTH

vs.

JAMES RILEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

James Riley was convicted by a Superior Court jury of assault by means of a dangerous weapon. In a separate jury-waived trial he was also convicted of being a habitual criminal. On appeal, Riley argues that it was error for the judge to deny his request for an instruction on the lesser included offense of assault and that the judge's denial of his motion for a required finding of not guilty on the habitual criminal charge was error. We affirm.

Background. At trial, the jury could have found the following. On January 17, 2014, Arlington police received a report of a bank robbery, including a description and license plate number of a Jeep used by the robber to get away.<sup>1</sup> Shortly

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<sup>1</sup> The defendant was acquitted of two counts of unarmed robbery relating to the theft.

after receiving this information Officer Michael Foley observed, pursued, and ultimately stopped, the Jeep. After the Jeep stopped, Foley was approximately thirty feet from the Jeep. He observed Riley get out of the Jeep on the driver's side and point what appeared to be a dark-colored handgun in Foley's direction. In response Foley drew his own weapon and ordered Riley to drop the gun. Riley then raised his gun and pointed it directly at Foley. Foley shot and wounded Riley, causing him to fall to his knees with his chest landing on the driver's seat of the Jeep. Foley approached the Jeep and saw what he believed to be a handgun near the driver's seat on the center console. During a subsequent search of the Jeep, police recovered a pellet gun located on the center console.

Lesser included offense. Riley raises both preserved and unpreserved claims of error relating to the jury instruction. At the charge conference, Riley's attorney requested a lesser included offense instruction on simple assault. Riley argued at the charge conference, as he does on appeal, that because a pellet gun was not a dangerous weapon per se, the jury could find that it was not a dangerous weapon at all. Since he objected to the judge's denial of his request for this reason, we review to determine whether the failure to instruct was error, and if it was, whether the error was prejudicial. See Commonwealth v. Vick, 454 Mass. 418, 423 n.5 (2009).

Additionally, for the first time on appeal, Riley argues that the lesser included offense jury instruction for simple assault should have been provided because the jury could have inferred that Riley exited the Jeep without the pellet gun and made a threatening gesture toward Foley without using a dangerous weapon. Without support from the record, Riley speculates that the jury could infer he "extended his thumb and forefinger in the shape of a gun." Since this argument was not raised at trial, we review under the substantial risk of miscarriage of justice standard. See Commonwealth v. Keewan, 400 Mass. 557, 564 (1987).

"When the evidence permits a finding of a lesser included offense, a judge must, upon request, instruct the jury on the possibility of conviction of the lesser crime. Commonwealth v. Campbell, 352 Mass. 387, 392 (1967). No such instruction is necessary . . . when the evidence provides no 'rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense.' Commonwealth v. Santo, 375 Mass. 299, 305 (1978). Commonwealth v. McKay, 363 Mass. 220, 228 (1973)." Commonwealth v. Gould, 413 Mass. 707, 715 (1992).

Riley first contends that since the jury could have found that the pellet gun was not a dangerous weapon, he was entitled to an instruction on the lesser included offense of assault.

"The standard definition of 'dangerous weapon' includes those items that are, by their nature, capable of causing serious injury or death, but also includes items that are used or displayed in a way such that they reasonably appear capable of causing serious injury or death. Commonwealth v. Tevlin, [433 Mass.] 305, 311 (2001); Commonwealth v. Tarrant, 367 Mass. 411, 416-417 (1975). Thus, an object that is, on closer inspection, incapable of inflicting serious injury or death can still be a dangerous weapon if, at the time of the offense, it would have been reasonable to believe that it was capable of inflicting such injury." Commonwealth v. Powell, 433 Mass. 399, 401 (2001).

Foley testified that Riley appeared to be holding a "dark-colored handgun," and when Foley ordered him to drop the gun, he pointed it directly at Foley. It was reasonable for Foley to believe the pellet gun was an actual handgun. The fact that the weapon ultimately turned out to be a pellet gun did not necessitate a lesser included offense instruction for simple assault.

Similarly, Riley's second argument that the jury could have found that Riley used his finger to make a threatening gesture toward Foley is without merit. There simply is no evidence to support this argument. "[A] judge is not required to instruct

on a hypothesis that is not supported by the evidence."

Commonwealth v. Santo, 375 Mass. 299, 305-306 (1978).

Habitual criminal. A jury-waived trial immediately followed the jury's verdict and produced a conviction on the charge of being a habitual criminal under G. L. c. 279, § 25 (a). On appeal, Riley argues that the judge erroneously denied his motion for a required finding. Riley maintains that the habitual offender conviction cannot stand because there was insufficient evidence presented for the judge to determine that the prior convictions arose out of separate episodes.

In reviewing the denial of a motion for a required finding, we consider the evidence in the light most favorable to the Commonwealth and ask if any rational trier of fact could have concluded that the Commonwealth met its burden of proof as to the essential elements of the crime charged. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

Pursuant to G. L. c. 279, § 25 (a), "a defendant who has been convicted of a felony and has two prior convictions resulting in State or Federal prison sentences of three years or more" is considered a habitual criminal and shall "be sentenced to the maximum term provided by law on the underlying conviction." Commonwealth v. Ruiz, 480 Mass. 683, 683-684 (2018). The Commonwealth must establish that the predicate

"convictions stem from separate criminal incidents."

Commonwealth v. Garvey, 477 Mass. 59, 67 (2017).

Riley contends that since the predicate offenses occurred during a crime spree, the predicate offenses were prosecuted together, and he received concurrent sentences on the predicate offenses, they should not be considered as separate offenses. We disagree.

The evidence at the jury-waived trial showed that over a two-day period, Riley and an accomplice broke into and stole from three separate homes located in three separate towns. This evidence was sufficient for the judge to conclude that there were three separate and distinct offenses that were committed at different places and times. The spatial and temporal differences between the break-ins were sufficient to allow Riley to contemplate what he had done and plan his next offense. Further, prosecuting Riley's prior separate offenses in one indictment and imposing concurrent sentences does not preclude a finding that Riley was a habitual criminal. "[P]redicate offenses arising from separate qualifying criminal incidents or episodes need not be separately prosecuted in order for a person to be considered a habitual criminal pursuant to § 25 (a)." Ruiz, 480 Mass. at 690. See Commonwealth v. Keane, 41 Mass. App. Ct. 656, 660 (1996) ("Concurrent prison sentences, imposed for separate and distinct offenses, together with a third

conviction of a felony, support a finding of habitual offender status under the statute"). Accordingly, there was no error in denying Riley's motion for a required finding.

Judgment affirmed.

By the Court (Green, C.J.,  
Vuono & Lemire, JJ.<sup>2</sup>),



Clerk

Entered: August 2, 2019.

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<sup>2</sup> The panelists are listed in order of seniority.